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OUR judicial system is accused of yielding under the strain of its own inefficiency. There are charges that our litigation machinery is ineffective in processing lawsuits and is irreparably broken down. Proposals for reform are never-ending. For the most part, these proposals are directed towards making our courts modern and efficient, thereby reducing the backlog of cases.[1] Certain of these proposals have raised far-reaching constitutional issues: for example, whether there should be no right to a jury in a civil trial[2] and whether a conviction based on a non-unanimous verdict[3] of a less than twelve-person

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1. Glenn P. Winters, Executive Director of the American Judicature Society, says: "Delay in courts is not a new problem nor is it a simple one. A satisfactory solution has eluded reformers for centuries. In the United States, the perennial problem of delay has been exacerbated by an explosive increase in the volume of litigation handled by the courts. Thus, American courts now struggle against twin evils, congestion and delay." *Preface* to SELECTED READINGS, COURT CONGESTION AND DELAY (J. Winters, ed. 1971).

The problem of delay in the courts was also recently studied by the Select Committee on Trial Court Delay, appointed by the Honorable Donald R. Wright, Chief Justice of the California Supreme Court. The result of this committee's efforts is published in a series of reports dealing with a number of topics, such as the use of court administrators, limitation on oral argument in selected civil matters, sanctions for failure to appear at various proceedings, criminal and civil trial procedures, automobile reparations, unified court system, calendar management and other topics frequently discussed under the general heading of judicial administration reform. 1-5 SELECT COMMITTEE ON TRIAL COURT DELAY, STATE OF CALIFORNIA, REPORTS (1971-1972). *See also,* ABA, THE IMPROVEMENT OF THE ADMINISTRATION OF JUSTICE (5th ed. 1971).

2. *E.g.,* Shapiro & Coquillette, *The Fetish of Jury Trial in Civil Cases: A Comment on Rachal v. Hill,* 85 HARV. L. REV. 442 (1971).

3. *E.g.,* Comment, *Changes in the Criminal Jury,* 43 MISS. L.J. 214, 219-23 (1972).

jury[4] should be permitted. At a time when court congestion forces these questions upon the profession, technological advances offer possible solutions without raising similar difficult constitutional questions.

The use of videotape techniques by our courts offers partial relief to those urban judicial districts which are burdened with cases awaiting trial. For those areas where trial delay is not a substantial problem, video techniques are not beyond consideration because of their possible contributions to fair and impartial justice. This article will not explore every possible use of videotape in the legal process. Rather, what is sought here is a basis for discussion and experimentation. Implicit in the proposals which follow is the view that judicial control is essential to the optimal use of video technology in our legal process. Because of the present broad scope of judicial discretion, our courts are well equipped to provide assessment, on an ad hoc basis, of the value of new techniques.

Videotape As a Legal Tool

Despite the fact that television is not new,[5] the adaptation of video technology for use by the legal profession is quite recent.[6] Because of videotape's low cost[7] and ease of use,[8] a nationwide interest has

4. Williams v. Florida, 399 U.S. 78 (1970) (jury can constitutionally consist of 6 members).

5. The first major telecast in the United States was staged on April 7, 1927. Regular commercial broadcasting was commenced by NBC in 1939 with an experimental station, broadcasting demonstrations at the World's Fair in New York. The first network use of videotape was in a news broadcast over CBS on November 30, 1956. Today most programs are presented prerecorded on film or videotape, Morrill, *Enter—The Video Tape Trial*, 3 JOHN MARSH. J. PRAC. & PROC. 237, 250 n.17 (1970).

6. *See* NATIONAL BUREAU OF STANDARDS, U.S. DEP'T OF COMMERCE, POTENTIAL USES OF COURT RELATED VIDEO RECORDING 11 (1972) [hereinafter cited as POTENTIAL USES OF VIDEO RECORDING].

7. An initial misconception about videotaping is that it is prohibitively expensive. It does not have to be. The initial capital investment for a video camera ranges from approximately $360 to $1895. *Id.* at 74. To view a tape, only a video monitor (a TV receiver) and a player (a reel-to-reel model or cassette) are required. Together these cost approximately $630 to $1750. *Id.* at 68 (video tape recorders), 76 (monitors). Portable systems, consisting of camera and recorder, are available for as low a cost as $1295. *Id.* at 78.

The estimated cost of a one hour stenographically reported deposition in San Francisco is between $50 to $60 for an original copy and $8 to $9 for each additional copy. Interview with John McDaniels, Sr., Gagan & McDaniels, Certified Shorthand Reporters, San Francisco, California, in San Francisco, May 10, 1972. The cost of a videotape deposition is between $60 to $120 per hour.

The Allegheny County Bar Association, Pittsburgh, Pennsylvania, has purchased equipment for videotaping depositions which is operated by trained Duquesne University Law Students. The equipment is available to all members of the bar. The cost of rental is $50 per deposition for the first three hours and $25 per hour for each hour

emerged in the use of television by the legal community. Experiments are being conducted with its use in courtrooms,[9] law schools[10] and continuing legal education programs.[11] In each of these instances, the efficiency and flexibility[12] of videotape has promoted its use as a time-saving device and as a means of increasing communication between lawyers, witnesses, judges and juries, and between professors and students.

In litigation, for example, videotape can be used: (1) to record *ex parte* statements of a witness or the re-enactment of an event,[13] (2) to record the deposition of a witness which may be used at trial,[14] (3) to record all, or at least most, of the testimony of witnesses before trial so it can be edited by the judge for sustainable objections and then presented in a continuous sequence at the trial,[15] and (4) to record testimony at trial so that an immediate record is available for use in preparation of appeal and review by an appellate court.[16] Of course,

over three plus $5 per hour for the operator. The tapes are retained by counsel until the completion of the case (including appeals) and are then returned for reuse. The Allegheny County Bar also provides a place for videotaping which is available without charge. Interview with the Honorable Joseph F. Weis, Jr., Federal District Judge, Pittsburgh, Pennsylvania, in San Francisco, Aug. 15, 1972.

8. Another misconception is that videotaping is too complicated for use by attorneys and courts. On the contrary, video recording and playback equipment is no more complicated to operate than a home movie camera or audio tape recorder. Video equipment generally yields fruitful results with greater ease than does photographic paraphernalia. Moreover, no special lighting is needed with videotape equipment, so the site for the taping need not be converted into a Hollywood set. POTENTIAL USES OF VIDEO REPORTING, *supra* note 6, at 65.

9. See text accompanying notes 98-100 *infra.*

10. Dresnik, *Uses of the Videotape Recorder in Legal Education,* 25 U. MIAMI L. REV. 543 (1971).

11. For example, the Hastings-American Trial Lawyers Association National College of Advocacy resulted in over eighty-five hours of video-taped lectures, panels and trial demonstrations in civil advocacy. Kornblum, *The Advocacy College: A Model for Post-J.D. Specialty Education,* 8 TRIAL, Mar./Apr. 1972, at 39; Kornblum & Rush, *Video Technology Serves the Legal Profession: Courtroom and Classroom Use of Television,* 58 A.B.A.J. — (1972).

12. Videotape recording differs from the ordinary methods of recording images in permanent form in that the image is recorded electronically rather than photographically. Instead of relying on light rays to convey an invisible image, which is then revealed through a chemical process as does standard photography, videotape employs a process whereby the image is sensed by the camera and changed into electrical impulses which can be recorded on the tape. Thus, as in sound recording, the tape used in videorecording does not have to be processed and thus can be replayed instantly. Moreover, videotape can also be used to provide either still or motion pictures. 1 C. SCOTT, PHOTOGRAPHIC EVIDENCE: PREPARATION & PRESENTATION § 87, at 72 (2d ed. 1969) [hereinafter cited as SCOTT].

13. See text accompanying notes 111-124 *infra.*

14. See text accompanying notes 29-83 *infra.*

15. See text accompanying notes 94-100 *infra.*

16. See text accompanying notes 103-104 *infra.*

once this testimony is admitted into evidence, it becomes an immediately reviewable record of the trial.[17] Consequently, this article focuses primarily on the problems of providing for video depositions and the presentation of prerecorded, videotaped testimony at trial.

Several areas of resistance to these uses of videotape in the courtroom are anticipated. Initially, technical[18] and procedural[19] questions are raised by the suggestion that deposition testimony be videotaped; similar questions stem from suggestions that special rules be devised for the recording of testimony of witnesses for replay at trial. These questions will be discussed primarily in the context of civil actions, since the civil case undoubtedly will provide the broadest opportunity for the use of prerecorded testimony on videotape. Also the civil case has been and continues to be the initial judicial arena for extensive testing of the use of video-recorded testimony. The use of video-recorded testimony in criminal cases present special problems which should be treated separately.[20]

Advantages of Videotaping Testimony

Whether videotape is used to record a witness's deposition, which may be used at trial, or to present all the evidence at trial, there are a number of advantages to videotaping testimony.[21] When a deposition

17. The use of videotape as a means of recording testimony at trial is discussed in ADMINISTRATIVE OFFICE OF THE ILLINOIS COURTS, INTERIM REPORT TO THE SUPREME COURT OF ILLINOIS, EXPERIMENTAL VIDEOTAPING OF COURTROOM PROCEEDINGS (1968).

18. *See generally* POTENTIAL USES OF VIDEO RECORDING, *supra* note 6, at 60-91. In addition, a reliable system must be devised to detect and prevent tampering with the recorded tape and preserve the integrity of the record. One solution is to simultaneously record on a split screen the movements of the sweep second hand of a clock. Such a procedure makes it all but impossible to distort the accuracy of the reproduction. *E.g.*, MICH. CT. R. 315.3(2) provides: "Every visual deposition shall be timed by means of a digital clock or clocks, which shall record hours, minutes, and seconds, which digital clock or clocks shall at all times during the taking of the deposition be in the picture." *Id.* 315, which was effective on December 1, 1972, sets forth the general rules under which visual depositions may be taken.

19. See text accompanying notes 83-93 *infra*.

20. These problems include the constitutional problems raised by the confrontation clause. *See generally* California v. Green, 399 U.S. 149 (1970); Barber v. Page, 390 U.S. 719 (1968); Pointer v. Texas, 380 U.S. 400 (1965). In addition, there is also the question of under what circumstances is a videotaped confession admissible. See text accompanying notes 116-120 *infra*. There are also unresolved issues concerning the right to a trial and whether the press and mass media should have access to videotapes for release to the public. For a discussion of some of the issues involved in using videotape in criminal cases see 20 DE PAUL L. REV. 924 (1971).

21. *See* Kennelly, *The Practical Uses of Trialvision and Depovision*, 16 TRIAL LAWYERS GUIDE 183 (Summer 1972); Merle & Sorenson, *Videotape: The Coming Courtroom Tool*, 7 TRIAL, Nov./Dec. 1971, at 55; Morrill, *Enter—The Video Tape*

is video-recorded, the visual image of the witness can be reviewed by counsel as well as the complete and accurate record of the verbal testimony. Long after the deposition has been recorded, counsel can review the videotape not only to refresh his memory, but also to analyze the witness's demeanor and integrity. This will allow counsel to evaluate the potential impact of the testimony on the jury.

The fact that a deposition has been pretaped is especially important in the situation where a witness is unavailable to testify at trial. Instead of merely listening to a transcript, the trier of fact can observe demeanor as well.[22] The witness's voice and its inflections, emphasis and intonations can be heard. His gestures can be seen. In fact, video viewing can provide a closer and clearer view of the witness's face than live presentation because of the special capabilities of a close-up lens.

In addition to providing a dynamic and efficient means of evaluating testimony before trial and allowing the trier of fact to observe an unavailable witness, video-recorded testimony may be used in lieu of live testimony. When this occurs, an obvious advantage is that the testimony can be pre-taped in the courtroom or in an office or studio. No longer does the schedule of witnesses for testimony at trial have to be restructured for the convenience of some witnesses. The idea of prerecorded testimony will no doubt be well received by doctors and other professionals, whose testimony at trial often is presented out of order to prevent disruption of their schedules. Presenting evidence out of order results in confusion on the part of jurors and many times detracts from the impact of a doctor's testimony. Through videotape, the testimony can be presented in a logical progression, so that it is easily digested by the jury by virtue of its placement in the overall sequence of the testimony. Out-of-town witnesses would not be inconvenienced by travelling to the site of the trial and waiting until they are scheduled to testify.

Also, since the tape can be edited by the judge before presentation to the jury, objections can be resolved with proper reflection on applicable precedents and authorities. Thus, the chances for error are

Trial, 3 JOHN MARSH. J. PRAC. & PROC. 237 (1970); Comment, *Video Tape: Its Admissibility in Evidence and Other Uses*, 5 GA. S.B.J. 393 (1969); Comment, *Videotape: A New Horizon in Evidence*, 4 JOHN MARSH. J. PRAC. & PROC. 339 (1971). The advantages of video depositions in Personal injury cases are discussed in *Aspects of Claims Handling by Videotape Recordings*, 20 FEDER. INS. COUNSEL Q., Summer, 1970, at 14. See also 1 F. LANE, GOLDSTEIN TRIAL TECHNIQUE § 6.30 (Supp. 1972).

22. See Ryan & Cassan, *Television Evidence in Court*, 122 AM. J. PSYCHIATRY 655 (1965), in which a video recording was used by a court to observe demeanor. The authors describe a competency hearing in which an interview by the treating psychiatrist of the patient was video-recorded and then played for the court so it could observe the patient's demeanor.

reduced substantially, and a jury is not forced to sit idle as lawyers argue in chambers. Additionally, where the testimony is pretaped, counsel can present more effective and precise opening and closing statements since they know in advance what the witnesses will say and have a more precise idea of the factual issues than if the testimony is presented live. Meanwhile, since the judge and counsel already have seen the video-recorded testimony, they need not be present during the showing to the jury.

In addition to providing a more convenient, more logical and more efficient trial, videotape, when used for presenting testimony at trial, provides an instant record for the appellate court. Appellate court judges can gain a more accurate perspective of the case.[23] In cases where most or all of the testimony is presented via videotape, counsel will not have to wait for a transcript to be prepared before beginning appellate briefs. With a tape transcript immediately available, he can review the record to determine if an appeal is advisable while the testimony and issues are fresh in his mind.

Some persons may be opposed to the use of videotape as a means of presenting evidence because they believe it will deprive the courtroom of excitement and drama. On the contrary, experiments to date indicate that the presentation of evidence on a television monitor focuses the juror's attention on the witness and enhances, rather than detracts from, his testimony.[24] Attorneys engaged in litigation know that a trial is usually an unexciting portrayal of dull and repetitious events. Frequently, this is due to attorneys who often take more time than is necessary to accomplish their tasks. The use of videotape to prerecord testimony will streamline courtroom procedures by making more efficient use of judges' and attorneys' time. This use of modern technology will also enhance the juror's role because the entire trial is edited to eliminate irrelevant portions before presentation to the jury.

The Use of Videotape in Civil Proceedings

Videotaped material is merely a new method of presenting evidence. As such, it will be subject to existing general principles and rules. Many of the precepts associated with our legal system are tied to the fundamental concept that the judge is the one impartial figure in a trial who is given wide latitude to control the course and conduct of a trial. This power is vested in him to be exercised for the benefit and protection of the interests of all parties involved. Any rational inte-

23. The use of videotape in appellate review presents many questions which are beyond the scope of this article. For example, will the appellate court substitute its judgment of the credibility of the witness for that of the trier of fact?

24. See articles cited note 98 *infra.*

gration of videotape techniques necessarily will superimpose their unique characteristics on our present legal structure. Rather than restrict or diminish these fundamental precepts, videotaped depositions and testimony merely provide a new mode of presentation.

As has been indicated, the most extensive use of videotape will be in civil cases. New rules must be devised for determining under what circumstances a party may video-record a deposition[25] or prerecord testimony for trial.[26] Consideration must be given also to liberalizing the rules regulating the use of video depositions in lieu of live testimony. It is clear, however, that any new rules must treat video depositions separately from prerecorded trial testimony and be in addition to the existing rules for discovery depositions.[27] As will be discussed,[28] the considerations involved in granting the right to a videotape deposition are widely different from those which precede its use, or the use of other videotaped material, as evidence at trial.

The Power to Authorize Videotape Depositions in California

The introduction of the use of videotape depositions in civil actions in California is not without legal problems. Many of these problems are created by the novelty of videotape technology. There is little law of value to an analysis of the use of videotape. Thus, these problems must be met by legislative amendment or, in some instances, judicial interpretation. Under present California law, they cannot be met by the rule-making powers of the judicial council or courts.[29] Even though these rule-making powers are broad, their exercise is limited when such exercise conflicts with statutes.[30] Therefore, it is necessary to examine California's statutory treatment of deposition procedures. The California Code of Civil Procedure deals with depositions in three contexts: (1) their definition;[31] (2) their methods of being recorded;[32] and (3) their use at trial.[33] With respect to definition, section 2004 of the code defines deposition as a "written declaration" taken under oath with notice to the nonrequesting party who has the

25. See text accompanying notes 29-93 *infra.*

26. *Cf.* Morrill, *Enter—The Video Tape Trial,* 3 JOHN MARSH. J. PRAC. & PROC. 237, 253-59 (1970).

27. *See* OHIO CIV. R. 30(B)(3) (nonstenographic depositions), 40 (videorecorded trial testimony). These are amplified by Superintendence Rule 15 adopted by the supreme court. OHIO SUP. R. 15 is set forth in 45 OHIO B.A.R. 1186 (1972).

28. See text accompanying notes 97-110 *infra.*

29. See text accompanying notes 94-96 *infra.*

30. CAL. CONST., art. 6, § 6; CAL. GOV'T CODE § 68070 (West 1964).

31. CAL. CODE CIV. PROC. § 2004 (West 1955).

32. *Id.* § 2019(c) (West Supp. 1972).

33. *Id.* § 2016(d).

right to cross-examine the deponent.[34] The largest impediment to use of videotape depositions lies in the code's and the courts' concept of what is a writing.

Section 17 of the Code of Civil Procedure limits writings to material that is either written, typed or printed. Without reference to the code's definitions of deposition or writing, the California court of appeal in *Voorheis v. Hawthorne-Michaels Co.*[35] buttressed this concept when it stated,

> [t]he term "deposition" is now confined in meaning to testimony delivered in *writing*; testimony which in legal contemplation does not exist apart from a *writing* made or adopted by the witness.[36]

On its facts, the decision is sound. In *Voorheis*, a deponent had made certain statements under oath, but died before he had the opportunity to review and sign the transcript.[37] The appellate court upheld exclusion of the document at trial since there was no guarantee—the deponent's signature—that it was the witness's testimony.[38]

Both the code's approach and the *Voorheis* dictum are rather mechanical approaches to the concept of writing. The code definition reflects the state of technological development as of 1903, the time of the definition's last amendment.[39] In *Voorheis*, there was no need to consider the impact of videotape material because the issue was not involved in the case and the decision was rendered while the idea of using videotape technology in the legal community was still in its fledgling stages. However, if these definitions are deemed controlling of any interpretation of a "written declaration," there can be no videotape deposition in California.

More recent legislative enactments, however, demonstrate that such a truncated reading should not be given to the term writing. In 1965, when the Evidence Code was spun off from the Code of Civil Procedure,[40] a more enlightened definition was given to the term writing. Under section 250 of the Evidence Code writing is defined broadly to include "all forms of tangible expression, including pictures and sound recordings."[41] Such a definition reflects the legislature's current recognition of technological changes which allow for a variety of methods to be used to record information.

Even though the Code of Civil Procedure may, when literally in-

34. *Id.* § 2004 (West 1955).
35. 151 Cal. App. 2d 688, 312 P.2d 51 (1957).
36. *Id.* at 692, 312 P.2d at 54 (emphasis added).
37. *Id.* at 690, 312 P.2d at 52.
38. *Id.* at 694, 312 P.2d at 54-55.
39. Cal. Stat. 1903, ch. 123, § 1, at 134.
40. Cal. Stat. 1965, ch. 299.
41. CAL. EVID. CODE § 250, Comment (West 1966).

terpreted, prevent the use of videotape recordings made under oath and in the presence of counsel, there is now justification for departing from the restrictive definition of the term deposition. The legislature has recognized the widespread use of videotape in our society and its relevance to legal proceedings by enacting the more liberal concept of a writing in the Evidence Code. The job is nevertheless only partially complete since the more restrictive definition contained in the Code of Civil Procedure has not been changed and apparently governs the definition of deposition contained in the same code. Consequently, the right to a videotaped deposition remains limited in California;[42] an amendment is required in order for a party to have a right to videotape a deposition in lieu of making a stenographic record.[43]

The method of taking depositions, on the other hand, is governed by another section of the Code of Civil Procedure and appears to be slightly more flexible with respect to use of videotape.[44] In 1957, the California legislature revised the state's deposition procedures,[45] framing them largely after the Federal Rules of Civil Procedure. The result was a modernization of California deposition procedures, which seemingly recognized the efficacy of videotape depositions. Section 2019 of the code provides:

> The officer before whom the deposition is to be taken shall put the witness on oath and shall personally, or by someone acting under his direction and in his presence, record the testimony of the witness. *The testimony shall be taken stenographically and transcribed unless the parties agree otherwise.*[46]

Since the parties can "agree otherwise," the initial recording of a deposition may be taken on videotape, providing both parties so agree. However, it should be noted that there is no provision for unilateral compulsion of a videotape recording; that is, there is no right to a videotape version of a deposition. Therefore, section 2019 also requires amendment to provide for a statutory right to a videotape transcription of the deposition.[47]

A possible reading of section 2019 is that the parties can stipulate to the final form of the deposition, as well as the method of recording. Since "[t]he testimony shall be taken stenographically *and* transcribed unless the parties agree otherwise,"[48] a modification of the requirement for a written declaration found in section 2004 is implied. That is,

42. See text accompanying notes 34-38 *supra.*
43. See text accompanying notes 29-30 *supra.*
44. CAL. CODE CIV. PROC. § 2019(c) (West Supp. 1972).
45. Cal. Stat. 1957, ch. 1904, § 3, at 3322.
46. CAL. CODE CIV. PROC. § 2019(c) (West Supp. 1972) (emphasis added).
47. See text accompanying notes 74-77 *infra.*
48. CAL. CODE CIV. PROC. § 2019(c) (West Supp. 1972) (emphasis added).

the parties can agree that the final form of the deposition be videotaped and not reduced to writing in the restrictive sense of the Code of Civil Procedure.[49]

Such a reading of section 2019 may be strained, particularly in light of the code definitions of a deposition[50] and writing.[51] Until the legislature removes these barriers, videotapes can, at the very least, be used to supplement written transcripts of depositions.[52] The party requesting the deposition must comply with sections 17 and 2004 by having a written transcript prepared. Once the testimony is stenographically recorded, a deposition has taken place. A video recording of that same testimony is merely an additional method of recording that testimony. This does not deprive the deposition of its character as such. After reviewing the videotape for accuracy, integrity and trustworthiness, the trial judge could allow its use in lieu of the written transcript because the videotape is only a different form of presenting what the stenographer recorded.[53] While section 2019 is a more recent enactment than sections 17 and 2004, and may, therefore, be viewed as embracing technological advances which lessen the need for a "writing" in the narrow sense, still the need for legislative revision of the Code of Civil Procedure remains apparent if deposition testimony is to be video-recorded only.

The broader definition of a writing contained in the Evidence

49. It is arguable that in enacting the new deposition procedures the legislature did not consider the code definition of deposition and intended to adopt the federal procedure in total. Thus, it can be argued that the decisions interpreting the federal rules are valuable precedent in interpreting the rules governing California deposition procedure. If this be the case, the parties can agree that the final form of the deposition shall be videotaped. *See* United States Steel Corp. v. United States, 43 F.R.D. 447 (S.D.N.Y. 1968).

50. CAL. CODE CIV. PROC. § 2004.

51. *Id.* § 17.

52. Letter from Max F. Deutz, Judge, Superior Court, Los Angeles County, to Guy O. Kornblum, May 22, 1972.

53. *Id.* Judge Deutz describes his ruling admitting a videotape deposition in Diaz v. County of Los Angeles, No. 947427 (Los Angeles Super. Ct.): "The plaintiff wanted to take the deposition of . . . an expert witness . . . . As the parties understood that the doctor would not be available in Los Angeles and . . . expected the trial to begin before a written transcript of deposition could be made up, they orally agreed to the video-tape, supplementing a regular stenographic reporter.

"The trial was delayed and at time of trial both written and video depositions were available. The defense therefore made a motion to prohibit the use of the video. Before ruling on the use of video, I read the deposition, heard objections to questions asked, and ruled thereon. As it turned out, the objections were all overruled and the deposition was otherwise clean, there being no objections or colloquy on the record. I then had the video played and sampled the recording at different stages of the deposition to satisfy myself that the video was fair representation and that there were no tricks of photography that would slant the presentation. Being so satisfied I ruled that the video could be used."

Code provides the inspiration for change of not only the definition of a deposition, but also the procedure by which a deposition may be taken. Consideration of sections 2004 and 2019 together is appropriate because the right to initially record a deposition on viedotape will be of limited use if the final form of the deposition must be a "written declaration," as that term is defined by the Code of Civil Procedure. There is another and far more persuasive reason why depositions should be defined to include videotape forms of the testimony. These reasons revolve around the use that can be made of depositions at trial.

Basically, depositions can be used to impeach witnesses, to introduce evidence of the statement of a party opponent or to provide testimony when a witness is unavailable at the time of trial.[54] Videotape evidence can be introduced in evidence as statutory exceptions to the hearsay rule in the case of impeaching testimony on statements of a party opponent and, when proper circumstances exist, through a judicially created exception in the case of an unavailable witness. Because videotape evidence can come in through the "backdoor" in many cases,[55] it makes little sense to preclude introduction of such evidence through the main channel as a deposition. Moreover, experience in other jurisdictions indicates that such a decision is merely an acknowledgement of the use of modern technology in the administration of justice.

Hearsay evidence is evidence of an extrajudicial statement that is offered to prove the truth of the matter stated.[56] Thus, because a videotape is not considered to be a deposition, videotape testimony taken under oath in the presence of counsel would run afoul of the hearsay rule. Hearsay evidence is inadmissible "[e]xcept as provided by law . . . ."[57] Almost all of the so-called "exceptions" to the hearsay rule are contained in statutes. However, the enumerated exceptions are not intended to be exclusive. The drafters' comment to the Evidence Code clearly indicate that the code is not intended to freeze the law of hearsay:

> Under Section 1200, exceptions to the hearsay rule may be found either in statutes or in decisional law . . . . [T]he courts have recognized exceptions to the exclusionary rule in addition to those exceptions expressed in the statutes . . . .[58]

Present statutory exceptions allow the admission of hearsay evidence to contradict or impeach the testimony of a witness.[59] There

54. CAL. CODE CIV. PROC. § 2016(d) (West Supp. 1972).
55. See text accompanying notes 56-69 *infra*.
56. CAL. EVID. CODE § 1200(a) (West 1966).
57. *Id.* § 1200(b).
58. *Id.*, Comment.
59. *Id.* § 1235 (prior inconsistent statement).

are also statutory exceptions which provide that any statement made by a party may be used against him.[60] Thus, the Evidence Code contains exceptions which allow the use of videotape statements—sworn or unsworn—in these two limited situations. Under these exceptions, counsel can admit videotape material in trial, thereby equalling two in-court uses of depositions—impeaching witnesses and use against a party.

Even though these two uses can be accommodated by the Evidence Code, the third in-court use of a deposition—when the deponent is unavailable—is not allowed under any of the statutory exceptions to the hearsay rule. This third use, however, is not entirely foreclosed. Exceptions can be recognized by decisional law.[61] Therefore, if the courts are willing to take the step, videotape declarations made under oath with the right of cross-examination can become admissible.

Judge-made exceptions to the hearsay rule have been based on trustworthiness and necessity.[62] "When hearsay evidence is admitted it is usually because it has a high degree of trustworthiness."[63] Thus, in *People v. Spriggs*,[64] the California Supreme Court created a hearsay exception based on the recognition that declarations against penal interest were unlikely to be false.[65] The admissibility of these declarations was to

> be determined in the light of the principle that "the purpose of all rules of evidence is to aid in arriving at the truth, [and] if it shall appear that any rule tends rather to hinder than to facilitate this result . . . it should be abrogated without hesitation." . . .[66]

The court held that the statement was so trustworthy that there was no need for unavailability.

> The question remains whether the admissibility of hearsay declarations against interest depends on the unavailability of the declarant to testify at the trial. If [the witness] was deceased, insane, suffering from severe illness, absent from the jurisdiction, or otherwise unavailable . . ., such unavailability provided a necessity for the evidence, thus affording a basis for its admissibility *in addition to the trustworthy character of the declaration.*[67]

60. *Id.* § 1220 (admission of party).

61. *Id.* § 1200, Comment.

62. *See* People v. Spriggs, 60 Cal. 2d 868, 874, 389 P.2d 377, 381, 36 Cal. Rptr. 841, 845 (1964); C. MCCORMICK, HANDBOOK ON THE LAW OF EVIDENCE §§ 325-27 (2d ed. 1972); 5 J. WIGMORE, EVIDENCE §§ 1420-27 (3d ed. 1940).

63. People v. Spriggs, 60 Cal. 2d 868, 874, 389 P.2d 377, 381, 36 Cal. Rptr. 841, 845 (1964).

64. 60 Cal. 2d 868, 389 P.2d 377, 36 Cal. Rptr. 841 (1964).

65. *Id.* at 874, 389 P.2d at 381, 36 Cal. Rptr. at 845.

66. *Id. quoting* Williams v. Kidd, 170 Cal. 631, 649, 151 P. 1, 8 (1915).

67. 60 Cal. 2d at 875, 389 P.2d at 381, 36 Cal. Rptr. at 845 (emphasis added). *But see* CAL. EVID. CODE § 1230 (West 1966) (requiring unavailability for admission of statements against interest).

Since court-made exceptions to the hearsay rule are recognized in California[68] and since they often are based on trustworthiness and necessity,[69] a decisional exception can be made to accommodate videotape "depositions" when the deponent is unavailable. Such an exception would put the videotape declaration on equal footing with the Code of Civil Procedure deposition. The videotape declaration would be trustworthy because it is made under oath with the opportunity to cross-examine. Its admission would be necessary if the dependent were unavailable. Thus, if a restrictive definition is given to the term deposition, a videotape record—made under circumstances identical to those under which a deposition is taken—could become admissible under exceptions to the hearsay rule. Two of these exceptions are statutory; the third use must be judicially created.

The Power to Authorize Videotape Depositions Outside California

Where the courts' rule-making power is not as restricted as it is in California,[70] that power has been used as a means of implementing new rules of deposition procedure. Certainly the example set by the United States Supreme Court and its advisory committee in promulgating the rules of criminal and civil procedure and the Rules of Evidence for the United States District Courts and Magistrates illustrates the efficacy and practicality of giving the highest court in the jurisdiction considerable latitude to supervise the judicial process of the courts in its jurisdiction. The federal rules regarding the manner of recording depositions are somewhat more flexible than their California counterparts.[71] Federal Rule of Civil Procedure 30(b)(4) provides:

> The Court may upon motion order that the testimony at a deposition be recorded by other than stenographic means, *in which event the order shall designate the manner of recording, preserving and filing the deposition, and may include other provisions to assure that the recorded testimony will be accurate and trustworthy.*[72]

Thus, the federal rule, unlike California's corresponding statute, permits a party to obtain judicial permission to videotape even if there is opposition to videotaping.[73]

68. See text accompanying notes 56-58 *supra.*

69. See text accompanying notes 63-67 *supra.*

70. See text accompanying notes 29-69 *supra.*

71. *Id.*

72. FED. R. CIV. P. 30(b)(4) (emphasis added). The rule further states: "If the order is made, a party may nevertheless arrange to have a stenographic transcription made at his own expense." *Id. See also id.* 30(c) which provides that the testimony shall be transcribed if requested by one of the parties. Thus, despite an order permitting videotaping, a party has a right to a stenographic transcription.

73. FED. R. CIV. P. 30(b)(4) was added in 1970. The advisory committee's note states regarding the addition: "In order to facilitate less expensive procedures,

The addition of Rule 30(b)(4) seems to have been motivated by *United States Steel Corp. v. United States.*[74] In that case, a federal district court granted a defendant's motion to preclude the use of videotape to record a deposition. The motion was granted even though the plaintiff had properly given notice of the deposition to the defendant, had stated in the notice that "said testimony will be taken in a room equipped with closed circuit television cameras capable of recording the testimony on an electronic tape"[75] and had offered the defendant an opportunity to inspect the equipment and oversee the videotaping. The court relied on Rule 30(c) as it then existed which, like the present California section,[76] provided in part that: "the testimony shall be taken stenographically and transcribed unless the parties agree otherwise." The court said:

> Unless the statutes so provide or the parties consent, there is no authorization for the use of a video tape recorder either at trial or at a deposition in the federal courts.[77]

As commendable as the federal response to *United States Steel Corp.* was, the federal rule requiring a court order appears to be an overly-cautious measure.[78] In other words, the party's absolute right

provision is made for the recording of testimony by other than stenographic means—e.g., by mechanical, electronic, or photographic means. Because these methods give rise to problems of accuracy and trustworthiness, the party taking the deposition is required to apply for a court order. The order is to specify how the testimony is to be recorded, preserved and filed, and it may contain whatever additional safeguards the court deems necessary." *Id.*, Notes.

74. 43 F.R.D. 447 (S.D.N.Y. 1968).

75. *Id.* at 450.

76. CAL. CODE CIV. PROC. § 2019(c) (West Supp. 1972).

77. 43 F.R.D. at 451. *See also* Galley v. Pennsylvania R.R. Co., 30 F.R.D. 556 (S.D.N.Y. 1962) applying the same rationale to a request for a court order for a deposition recorded by audiotape.

78. An earlier draft of the 1970 amendments to the federal rules would not have required a court order, but simply would have allowed the party to designate in the notice of taking the means by which the deposition would be recorded, subject to the power in the court to make orders to assure that the recorded testimony would be accurate and trustworthy. PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO RULES OF CIVIL PROCEDURE RELATING TO DEPOSITION AND DISCOVERY (Nov. 1967) reprinted in 43 F.R.D. 211, 239-40 (1967). *See also* 8 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2115, at 424-25 (1970) (hereinafter cited as WRIGHT & MILLER).

Unfortunately, the advisory committee in recommending the adopted change to Rule 30(b)(4) did not provide any guidelines for determining under what conditions a non-stenographic deposition is to be permitted. Kallen v. Nexus Corp., 54 F.R.D. 610 (N.D. Ill. 1972) is the only case which has discussed the guidelines to be used in safeguarding a non-stenographic record under Rule 30(b)(4). Before the court was plaintiffs' "Motion for an Order Determining that Future Discovery Taken in this Action be Taken by other than Stenographic Means" (audio tape). The court granted the motion but imposed a number of safeguards. These safeguards were discussed under three headings: (1) allocation of responsibility for selection of the reporter, (2) op-

to a stenographic deposition[79] should be extended to a right to a videotape deposition, regardless of any court order.[80] This extension would in no way preclude a party's right to make a stenographic recording of the proceedings at his own expense.

A recently amended rule in Ohio illustrates the direction in which both the California and federal rules should go, in that it allows a party to record the deposition by other than stenographic means provided the notice of deposition specifies "the manner of recording, preserving and filing the deposition."[81] It would appear that the Ohio approach permitting a party to record a deposition with videotape by simply giving notice provides sufficient protection against injustice or abuse of this procedure. Protective orders are available to prevent a deposition from being videorecorded because an injustice may result.[82] Also, experiences to date indicate that the present rules of court procedure should be revised to permit greater judicial latitude for permitting, admitting and controlling video-recorded depositions.[83] Video-recorded depositions should be admitted at trial, at least in civil cases, simply on a showing that a witness will be substantially inconvenienced by having to appear at trial. Such a rule would give the court the latitude it needs to ensure an efficient and fair presentation of the evidence.

Changes in Deposition Procedure

Several questions are raised concerning the procedure to be em-

erator independence and (3) recording quality. *Id.* at 613-14. For example, tandem tape recorders and lavalier microphones were required. *Id.* at 614. At least one judge concludes these are unnecessary. Remarks by the Honorable Joseph F. Weis, Jr., Federal District Judge, Pittsburgh, Pennsylvania, before the General Practice Section of the A.B.A., in San Francisco, Aug. 15, 1972.

79. FED. R. CIV. P. 30(a) provides that "any party may take the testimony of any person . . . by deposition . . . ."

80. *See* PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO RULES OF CIVIL PROCEDURE RELATING TO DEPOSITION AND DISCOVERY (Nov. 1967), reprinted in 43 F.R.D. 211, 239-40 (1967).

81. OHIO CIV. R. 30(b)(3). The Ohio Supreme Court has adopted Superintendence Rule 15 which amplifies the videotape provisions of *id.* 30 (depositions) and implements *id.* 40 (videorecording of all testimony and other evidence for presentation at trial). OHIO SUP. R. 15 is set forth in 45 OHIO B.A.R. 1186 (1972). For a discussion of the formal requirements under both the Ohio and federal rules see Miller, *Videotaping the Oral Deposition,* 18 PRAC. LAW., Feb. 1972, at 45, 47-50. Other states have adopted rules providing for audio-video recording of depositions. *E.g.,* MICH. CT. R. 315 (no motion required; notice must state what deposition is to be visually recorded). For a summary of statutes and court rules affecting the use of videorecording in the courts see POTENTIAL USES OF VIDEO RECORDING, *supra* note 6, at app. A, at 108-84.

82. *See* FED. R. CIV. P. 26(c) & 30(d); CAL. CODE CIV. PROC. § 2019(a)(1) & (b)(1) (West Supp. 1972).

83. See note 101 *infra.*

ployed when a deposition is videotaped. However, because videotape procedures are merely variations of an existing theme, many of these questions are rhetorical. It is nevertheless useful to examine various issues to illustrate the point. For example, a problem arises regarding whether the videotape deposition must be replayed to the deponent for correctness and signed by him. This problem is implied by Federal Rule of Civil Procedure 30(e) which provides that:

> When the testimony is fully *transcribed*, the deposition shall be submitted to the witness for *examination* and *shall be read to or by him* . . . . Any changes in form or substance which the witness desires to make *shall be entered upon the deposition* . . . . The deposition shall then be *signed* by the witness . . . .[84]

From the manner in which Rule 30(e) is worded, it appears that only a *stenographically* reported deposition must be submitted to the witness for examination and reading. The deposition must then be signed by the witness unless the parties—not the witness—agree otherwise or the witness is ill or cannot be found.[85]

The California signature requirement is similar to that of the federal rules.[86] It would appear, however, that the deponent must review and sign the videotape deposition. This conclusion is supported by dictum in *Reimel v. House*.[87] In *Reimel*, the court of appeal stated "[I]t is the *reading and signing* of a deposition *by the deponent* that renders it his testimony, rather than its mere recordation . . . ."[88] Of course, *Reimel* did not consider the videotape deposition situation. When depositions are taken stenographically, there are three elements which may be a source of error: "the personality of the official writer, the verbal accuracy of his transcription of the witness' utterance, and the *witness' deliberate and knowing indorsement of the transcription as completed*."[89] Although the use of videotape as the recording medium virtually eliminates the first two elements, the witness's adoption of the testimony as his own is not fulfilled by an unviewed and unsigned videotape. For this reason the signature requirement can not be so easily set aside as being limited to stenographically reported depositions. Therefore, if under either the federal or California practice

84. FED. R. CIV. P. 30(e) (emphasis added).

85. The procedure for signing a stenographically-reported deposition is described in Kornblum, *The Oral Civil Deposition: Preparation and Examination of Witnesses*, 17 PRAC. LAW., May, 1971, at 11, 15-16. *See also* Wolfstone, *Discovery—Oral Deposition*, 4 AM. JUR. TRIALS 118, 180-2 (1966) [hereinafter cited as Wolfstone, *Oral Depositions*].

86. CAL. CODE CIV. PROC. § 2019(e) (West Supp. 1972).

87. 268 Cal. App. 2d 780, 74 Cal. Rptr. 345 (1969).

88. *Id.* at 786, 74 Cal. Rptr. at 349 (emphasis added).

89. Voorheis v. Hawthorne-Michaels Co., 151 Cal. App. 2d 688, 693, 312 P.2d 51, 54 (1957) (emphasis added).

the requirement is read to include non-stenographic depositions, a video deposition can be signed by a witness by placing his signature on a sticker which is affixed to a sealed videotape reel or cassette.

Regardless of how the signature requirement is treated, the witness and the parties should not have a right to change the testimony given at a videotaped deposition because of alleged defects in its form since there is, except for mechanical failure, virtually no chance for error.[90] What is seen on the videotape is what actually occurred at the deposition, not what another person (the reporter) thought transpired. Also, the videotape transcription is more complete because it includes an account of the demeanor of the witness.

The witness nevertheless should have the right to review the videotape in preparation for the testimony at trial. This is analogous to present practice whereby witnesses review their deposition before testifying. Counsel also should be permitted to see the tape to ensure that no mechanical failure has occurred, to determine whether there is objectionable material and to prepare for trial. Again, this is merely an extension of present standard practices.

A second question, which is important if the video-recorded deposition is to be used at trial, is whether the camera should focus only on the witness or also on the attorney when he asks a question.[91] If the former, counsel's role is minimized. Since one of the benefits of using videotape is that jurors can easily see facial expressions and gain a better understanding of the testimony, the lawyer's face and gestures should be shown as he asks questions.[92] From a technical standpoint, switching the camera from image to image undoubtedly relieves the monotony of watching the same image. A split screen could be used to show the lawyer and witness simultaneously. To others, however, the switching from image to image or the use of zoom lenses during tense periods or critical portions of the testimony appears to highlight a portion of the testimony. This results in inadvertent editing of the transcript.

One major advantage to focusing only on the witness is that the deposition would be less expensive. Only one camera is required. No technical assistance is needed except for the camera operator. Focus-

90. Generally, at least in regard to a stenographically recorded deposition, a witness has a right to examine and read the deposition and to make corrections to his testimony by entering those corrections on the deposition. CAL. CODE CIV. PROC. § 2019(e) (West Supp. 1972); FED. R. CIV. P. 30(e).

91. This question comes up in discussing videotaping testimony for use at trial.

92. Whether the jury should see counsel or not is a question of minor importance. In fact, with present stenographically recorded depositions the jury is simply read the record. Focusing on counsel would lend itself to a matching of personalities and play-acting by counsel.

ing on both the attorney asking the question and the witness answering requires two cameras and possibly two cameramen or technical assistants. To avoid the expense of two cameramen, cameras could be operated by a single operator from a remote control board.[93] Regardless of the number of cameras, a separate microphone should be used by each speaker. If only one microphone is used, the sound is often garbled, especially when persons speak simultaneously. Few depositions take place when this does not occur.

The Videotape Trial

In the area of videotape trials, the courts' rule-making powers assume a greater dominance than in the area of depositions. In California, a judicial council composed of state trial and appellate judges, state bar members and state legislators has the power to "adopt rules for court administration, practice and procedure, not inconsistent with statute, and perform other functions prescribed by statute."[94] In addition, section 68070 of the California Government Code provides that: "Every court of record may make rules for its own government and the government of its officers not inconsistent with law or with the rules adopted and prescribed by the Judicial Council." This provision recognizes the inherent power of the court to "make rules of procedure which do not conflict with constitutional or legislative provisions."[95] Thus, in the area of the course and conduct of trials, the courts have great latitude in introducing innovative techniques.[96]

The exercise of these broad rule-making powers should allow videotape to be used to prerecord testimony for trial which can then be edited by the judge in his chambers with legal authorities close at hand and subsequently played to the jury in a logical, uninterrupted sequence.[97] No longer need trials be delayed while counsel argue in chambers, nor do trials have to be rescheduled because a doctor suddenly is called into surgery. The testimony can be prerecorded at the convenience of witnesses and counsel. The judge does not have to be

93. The training of an operator of a control board is relatively easy because the job requires no special background.

94. CAL. CONST., art. 6, § 6.

95. Albermont Petroleum, Ltd. v. Cunningham, 186 Cal. App. 2d 84, 89, 9 Cal. Rptr. 405, 407 (1960). *See also* Lorraine v. McComb, 220 Cal. 753, 32 P.2d 960 (1934); Cantillon v. Superior Ct., 150 Cal. App. 2d 184, 309 P.2d 890 (1957); Smith v. Smith, 125 Cal. App. 2d 154, 270 P.2d 613 (1954).

96. This latitude has been recognized in the recently adopted Code of Judicial Conduct. A judge may authorize "the use of electronic or photographic means for the presentation of evidence, for the perpetuation of a record, or for other purposes of judicial administration . . . ." ABA CODE OF JUDICIAL CONDUCT Canon 3 A(7)(a), reprinted in 58 A.B.A.J. 1207, 1208 (1972).

97. See text accompanying notes 98-100 *infra*. *Cf.* OHIO CIV. R. 40.

present during the taping session. His presence is not required while the testimony is played for the jury because he has seen the tape during the editing session.

Until November 18, 1971, when *McCall v. Clemens*[98] was tried in the court of the Honorable James L. McCrystal, no trial had been conducted using only the pretaped testimony of witnesses. *McCall* is the first case in which all testimony has been prerecorded, edited for sustainable objections, and presented in a continuous sequence to a jury. The facts presented a straightforward pedestrian-auto case. The testimony of four witnesses—the plaintiff, a policeman, the records custodian, and the treating physician—was pretaped under court-approved stipulations. It was done out of the presence of the judge and then was edited by him while considering objections to possible inadmissible evidence. The attorneys were given an opportunity before the trial to discuss the judge's rulings on the objections. *Voir dire* and opening statements were presented live. The videotaped testimony was put in proper order by the judge and played in continuous sequence for the jury, which recessed every 45 or 50 minutes. Total playing time for presentation of the testimony was two hours and fifteen minutes. After the testimony was completed, the attorneys presented their closing arguments live. The judge's instructions, which were also videotaped, were played to the jury which then commenced deliberations. The trial began at 9:00 a.m.; the jury returned its verdict at 5:00 p.m.—*the same day*.[99] The most important result is that the reaction of all the participants—judge, jury, witnesses and counsel —was most favorable.[100] Thus, *McCall* demonstrates the effectiveness and efficiency of using videotape procedures and prerecorded testimony. It opens a new dimension for presenting evidence in the courtroom and, as mentioned above, will require a new and different set of rules from those presently governing discovery depositions.

98. McCall v. Clemens, Civil No. 39, 301 (C.P. Erie County, Ohio, Nov. 18, 1971). For articles describing the case see Gunther, *Is Television the Answer for Our Crowded Courts?*, T.V. GUIDE, Mar. 25, 1972, at 6; TIME, Dec. 27, 1971, at 42. For articles describing the experiences of Judge McCrystal and the participating attorneys see McCrystal, *Ohio's First Videotape Trial*, 45 OHIO B.A.R. 1 (1972); Murray, *Comments on a Videotape Trial—from Counsel for the Plaintiff*, 45 OHIO B.A.R. 25 (1972); Watts, *Comments on a Videotape Trial—from Counsel for the Defense*, 45 OHIO B.A.R. 51 (1972). *See also* McCrystal, *Videotape Trials*, 44 OHIO B.A.R. 639 (1971); McCrystal, *Videotape Trials: Relief for our Congested Courts*, — DENVER L.J. — (1973).

99. TIME, *supra* note 98, at 42.

100. *See* McCrystal, *Ohio's First Videotape Trial*, 45 OHIO B.A.R. 1 (1972); Murray, *Comments on a Videotape Trial—from Counsel for the Plaintiff*, 45 OHIO B.A.R. 25 (1972); Watts, *Comments on a Videotape Trial—from Counsel for the Defense*, 45 OHIO B.A.R. 51 (1972). *See also* Gunther, *Is Television the Answer for Our Crowded Courts?*, T.V. GUIDE, Mar. 25, 1972, at 6, 8-10.

Practical Problems of all Videotape Trial

The presentation of all or a substantial portion of the evidence on videotape involves a new concept regarding the admissibility of extrajudicial statements, prerecorded evidence and "copies" of documents. It should be understood that once the concept of using video-recorded testimony is accepted, the traditional procedural bars to the introduction of prerecorded oral non-video testimony should be modified.[101] Even though the jury is viewing a recording, it should not be regarded as viewing a prior statement under the hearsay rules. The taping session and the presentation to the jury together constitute the trial.[102] Therefore, new rules should be devised regarding the conditions under which court-supervised video-recorded testimony will be permitted.

As a general proposition, the presentation of all evidence via videotape should be permitted whenever it is more convenient to the parties and witnesses, so long as a substantial injustice or special hardship would not result. The parties should be given wide latitude to stipulate that all evidence shall be video-recorded for presentation at trial.[103] Furthermore, the courts should be given discretion to order all testimony prerecorded on videotape for use at trial.

One major advantage of the videotape trial is that it reduces the opportunities for error. Testimony can be taken subject to objections which the judge will consider at a later time. Counsel would advise the judge of the objections by making them at the time testimony is taken. If the objections cannot be cured by reframing the questions, counsel should submit subsequent written notice. These written objections could be accompanied by authorities and briefs. Such a process would allow the judge to review the tapes and consult authorities. Counsel would be advised of the judge's ruling. In the event that the judge would require additional consultation, he could call an eviden-

101. *See, e.g.,* CAL. EVID. CODE § 1200 (West 1965); CAL. CODE CIV. PROC. § 2016(d)(3) (West Supp. 1972). Deposition testimony is admitted if "upon application and notice . . . such *exceptional circumstances* exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court . . . ." FED. R. CIV. P. 32(a)(3) (emphasis added). Since the factors militating against extensive testimony by deposition at trial do not apply when the deposition is audio-visual, the serious inconvenience of an already deposed witness should be regarded as an "exceptional circumstance." OHIO CIV. R. 32(A)(3)(e) provides that any deposition, video-recorded or not, may be read into evidence if the witness "is an attending physician or medical expert, although residing within the county in which the action is heard . . . ." This provision has been added to the traditional situation in which a deposition may be admitted into evidence. *See id.* 32(A)(3)(a)-(d), (g).

102. The traditional rules would still apply where the taping was done as a deposition, rather than as testimony for trial. *But see* note 101 *supra.*

103. *See* OHIO SUP. R. 15(C) set forth in 45 OHIO B.A.R. 1186 (1972).

tiary conference. In fact, such a conference will be required for the purpose of discussing the order of presentation of the testimony as well as the arrangements for presentation of the videotape to the jury.

The question will undoubtedly arise whether and under what circumstances a party should have the right to present at trial the live testimony of a witness whose testimony has been prerecorded. Perhaps in certain cases, counsel should be permitted to conduct a live examination with the court specifying appropriate limitations on the scope of examination and other conditions it determines are fair and necessary for the protection of the witness and the parties. Again, such a procedure would give the court wide latitude and flexibility in overseeing the conduct of the trial. However, the court should not countenance the use of live testimony where its sole purpose is either undue delay or needless repetition.[104]

Changes in Examination Strategy

The necessity of devising separate rules for videotape depositions and prerecorded testimony for use at trial should be obvious at this point.[105] There is no reason why counsel should not be permitted to take a discovery deposition, by means of videotape or otherwise, and later video-record testimony for trial after discovery is completed.[106] The witness would not be inconvenienced since he would be called for trial in any event. The flexibility of scheduling videotaped testimony is desirable because it removes some of the procedural unpleasantries that influence the disposition of a witness and thereby possibly color his testimony.

Moreover, the objectives of examination at a deposition and trial are different. In addition to providing counsel with information about the case, the setting at a deposition offers counsel the opportunity to force a witness to commit himself to a version of the facts. In most cases, counsel does not impeach a witness at his deposition unless the deposition is to be used at trial. Impeachment evidence, particularly evidence of prior inconsistent statements, is most effectively used at trial when the witness can be confronted with it while he sits before the

104. *See* FED. R. EVID. 403, reproduced in 41 U.S.L.W. 4021, 23 (Nov. 21, 1972); CAL. EVID. CODE § 352 (West 1965).

105. *See, e.g.,* OHIO CIV. R. 30 (depositions); *id.* 40 (videorecording of all testimony and other evidence for presentation at trial).

106. The rules regarding "second depositions" should not apply to testimony being recorded for trial. The circumstances under which one may prevent a deposition from being taken or require it to be taken under certain circumstances are discussed in 4 J. MOORE, FEDERAL PRACTICE ¶¶ 26.69, 26.72 (2d ed. 1948). *Cf.* Rosenblum v. Dingfelder, 2 F.R.D. 309 (S.D.N.Y. 1941); Welty v. Clute, 1 F.R.D. 446 (W.D.N.Y. 1940).

jury and before he has time to prepare an explanation of the inconsistency.[107]

If the trial is prerecorded, however, counsel would be compelled to reveal any known impeaching evidence at the taping session.[108] The witness thus would be examined about his statements in front of the camera rather than in the presence of the jury. Whether this would reduce the tactical impact of utilizing impeachment evidence at trials remains to be seen. This is doubtful because a jury would give the inconsistency due consideration whether the witness was confronted with it before the camera or in front of the jury. The one major disadvantage to the impeaching party is that opposing counsel would have additional time to uncover evidence to rehabilitate the witness by subsequent testimony,[109] either videotaped or live depending on the rules of the particular jurisdiction.[110] In any event, the camera would record the witness's demeanor and reaction when confronted with evidence of the inconsistency, and from this confrontation, the jury could fairly assess the value of the impeaching testimony.

Standards for Admitting Ex Parte Videotape Material

The use of audio-visual techniques in the courtroom is not new.[111] However, until recent experimentation with video depositions and pretaped testimony, the preparation of audio and visual materials for use in the courtroom as evidence was primarily *ex parte*. Audio recorders, for example, have been used for a number of years by law enforcement agencies to record conversations and confessions. These audio tapes have been scrutinized carefully by the courts before being admitted into evidence, partly because of the possibility of tampering with the tape and partly because of the lack of confidence in their technical

107. *See* Jackson, *Cross-Examination of Plaintiff*, 6 AM. JUR. TRIALS 201, 249-59 (1966). Wolfstone, *Oral Deposition, supra* note 85, at 170, recognizes this fact with regard to depositions: "Being cognizant of the fact that jurors are notoriously unimimpressed and even indifferent to testimony presented at the time of trial by [non-video] deposition only, counsel should preface important questions with the introductory, 'Will you please tell the judge and jury—' or, 'Will you please draw a diagram and illustrate the occurrence for the jury.' "

108. This presents no problem because taping and viewing are combined to form the trial. See text accompanying notes 101-102 *supra*.

109. See CAL. EVID. CODE § 1236 (West 1965) (prior consistent statements). In any event, rehabilitation of the impeached witness would require adherence to Evidence Code sections 791 and 1236.

110. Under the new Ohio Rules, once the testimony is videotaped for trial, there is no right to present live testimony. OHIO SUP. R. 15(C) 1 set forth in 45 OHIO B.A.R. 1186, 1188 (1972).

111. *See* Boyko, *The Case Against Electronic Courtroom Reporting*, 57 A.B.A.J. 1008 (1971); Reynolds, *Alaska's Ten Years of Electronic Reporting*, 56 A.B.A.J. 1080 (1970). See text accompanying notes 116-127 *infra*.

performance. Consequently, tape-recorded evidence has been subject to a strict standard of admissibility.[112]

Slides, photographs, viewgraphs and particularly movie film are dramatic, effective and efficient methods of presenting evidence at trial.[113] These methods have been used to portray events which have occurred or to recreate events for the jury.[114] Personal injury attorneys are probably the most familiar with the use of movie film as a means of re-enacting an accident. Motion pictures can also demonstrate to a jury how a seriously and permanently injured plaintiff's life style has changed because of an injury. Conversely, an alert defense may be able to show that a plaintiff has engaged in activities which he claimed he could not do because of an injury.[115]

Despite these uses of audio-visual materials, apparently only three cases have discussed the standard for admissibility of videotapes prepared *ex parte*. Although these three were criminal actions, the standards of admissibility in civil actions would be no stricter than those announced. In *Paramore v. State*,[116] a videotape confession was admitted into evidence. In sustaining the trial court, the Florida Supreme Court held that the standard of admissibility of videotaped material is the same as that of motion pictures.[117] The court relied extensively on *People v. Hayes*[118]—a longstanding precedent from California. In *Hayes*, the court of appeal sustained the admission of a sound motion picture of defendant's confession. The motion picture was admitted after a preliminary determination by the trial judge that it was an accurate reproduction of the events which allegedly occurred. On appeal, the court said:

> If after a preliminary examination, the trial judge is satisfied that the sound moving picture reproduces accurately that which has been said and done, and the other requirements relative to the admissibili-

112. See note 122 *infra*.

113. *See* 2 M. BELLI, MODERN TRIALS §§ 225-60 (1954); M. BELLI, MODERN TRIALS §§ 225-60 (abr. ed. 1963); 2 F. LANE, GOLDSTEIN TRIAL TECHNIQUE §§ 12.21-12.25, 12.28 (2d ed. 1969).

114. There is some conflict among the authorities as to whether posed pictures should be admitted, but the better view appears to be that they are admissible. C. MCCORMICK, HANDBOOK ON THE LAW OF EVIDENCE § 214 , at 533 (2d ed. 1972); 3 J. WIGMORE, EVIDENCE § 798 (J. Chadbourn rev. 1970); B. WITKIN, CALIFORNIA EVIDENCE § 638 (2d ed. 1966); Annot., 19 A.L.R.2d 877. On reenactments, see B. WITKIN, CALIFORNIA EVIDENCE § 648 (2d ed. 1966). *Compare* Streit v. Kestel, 108 Ohio App. 241, 161 N.E.2d 409 (1959) (motion picture admissible for impeaching witness's testimony by demonstrating visually the fallacy of testimony) *with* People v. Logan, 41 Cal. 2d 279, 284-85, 260 P.2d 20, 23 (1953) (photographs inadmissible as unduly prejudicial).

115. *E.g.*, Wolfstone, *Oral Deposition*, *supra* note 85, at 168.

116. 229 So. 2d 855 (Fla. 1969).

117. *Id.* at 859.

118. 21 Cal. App. 2d 320, 71 P.2d 321 (1937).

> ty of a confession are present . . . then, not only should the preliminary foundation and the sound moving picture go to the jury, *but, in keeping with the policy of the courts to avail themselves of each and every aid of science for the purpose of ascertaining the truth, such practice is to be commended as of inestimable value to triers of fact in reaching accurate conclusions.*[119]

In response to the frequently heard objection in criminal trials that a defendant's confession was induced either by threats of force or under the hope or promise of immunity or reward, the court said,

> When a confession is presented by means of a movietone the trial court is enabled to determine more accurately the truth or falsity of such claims and rule accordingly.[120]

In the third of these cases, *State v. Newman*,[121] the Washington appellate court was asked to determine the standard of admissibility for a videotape recording of a lineup. Defendant contended that the standards for admitting the videotape were the strict standards applicable to wire or audio tape.[122] Rejecting this assertion, the court held that the standard for admitting videotape is the less cumbersome standard applied to photographs and motion pictures:[123]

> To lay a proper foundation for such demonstrative evidence, it is only required that some witness . . . be able to give some indica-

119. *Id.* at 322, 71 P.2d at 322-23 (emphasis added).

120. *Id.*, 71 P.2d at 323.

121. 4 Wash. App. 588, 484 P.2d 473 (1971).

122. Defendant relied on an earlier Washington case. State v. Williams, 49 Wash. 2d 354, 301 P.2d 769 (1956). The standards for the admissibility of wire or audio tape are:

"a. It must be shown that the mechanical transcription device was capable of taking testimony.

"b. It must be shown that the operator of the device was competent to operate the device.

"c. The authenticity and correctness of the recording must be established.

"d. It must be shown that changes, additions or deletions have not been made.

"e. The manner of preservation of the record must be shown.

"f. Speakers must be identified.

"g. It must be shown that the testimony elicited was freely and voluntarily made, without any kind of duress." *Id.* at 360, 301 P.2d at 772, *quoting from* Steve M. Solomon, Jr., Inc. v. Edgar, 92 Ga. App. 201, 211-12, 88 S.E.2d 167, 171 (1955). *See also* United States v. Birnbaum, 337 F.2d 490 (2d Cir. 1964); Gonzales v. United States, 314 F.2d 750 (9th Cir. 1963); Todisco v. United States, 298 F.2d 208 (9th Cir. 1961) *cert. denied*, 368 U.S. 989 (1962); Monroe v. United States, 234 F.2d 49 (D.C. Cir.), *cert. denied*, 352 U.S. 873 (1956); United States v. McKeever, 169 F. Supp. 426 (S.D.N.Y. 1958); People v. Spencer, 60 Cal. 2d 64, 383 P.2d 134, 31 Cal. Rptr. 782 (1963); People v. Curry, 192 Cal. App. 2d 664, 13 Cal. Rptr. 596 (1961); 1 E. CONRAD, MODERN TRIAL EVIDENCE § 715 (1956); Conrad, *Magnetic Recordings in the Courts*, 40 VA. L. REV. 23 (1954) [hereinafter cited as Conrad, *Magnetic Recordings*].

123. See 3 SCOTT, *supra* note 12, at § 1293.

> tion as to when, where, and under what circumstances the photograph was taken, and that the photograph accurately portrays the subject illustrated . . . . It is then admissible in the sound discretion of the trial court . . . .
>
> The requirements for the admission of videotapes should be similar to those for photographs. In the present case, the detective witness testified concerning the circumstances of the videotape recording of the lineup and also testified that it was a fair and accurate reproduction of the appellant's lineup. The [trial] court then admitted the videotape recording.[124]

Both *Paramore* and *Newman* are well reasoned. A simple foundational requirement of establishing that the recording is an accurate reproduction of what took place should be sufficient for admissibility. Like any other piece of evidence, the videotape would then become admissible unless it was subject to objection, in which case the burden would be on the challenger to prove its inadmissibility.

Admissibility of Copies of Videotaped Testimony

A corollary issue which similarly is not limited to civil cases concerns the question of under what circumstances a copy of the original videotape is admissible. More technically, the question is whether a videotaped copy should be subject to the best evidence rule.[125] The best evidence rule in California as stated in section 1500 of the Evidence Code reads:

> Except as otherwise provided by statute, no evidence other than the writing itself is admissible to prove the content of a writing.[126]

The reason for the rule is to ensure that the original is seen by the trier of fact when the contents of the "writing" are in issue. Minor differences in letters or symbols may make vast differences in meanings. To

124. 4 Wash. App. at 593, 484 P.2d at 476-77. *See also* 3 SCOTT, *supra* note 12, at § 1294: "Video tape recordings really are motion pictures made by recording both sight and sound electronically on magnetic tape. When made in this way there are no visible pictures and no audible sound until the tape is played back. Therefore, unlike an ordinary motion picture film, the video tape bearing invisible electronic impulses cannot be said to be a series of still pictures. . . .

"The process by which a motion picture is produced should have no bearing upon its admissibility as long as it can be verified as a fair representation of its subject. Accordingly, video tape recordings should be admitted in evidence and played back for court and jury on the same basis as ordinary motion pictures on film, subject only to the usual showing of relevancy and materiality and to proper verification."

125. This is to be distinguished from the question whether recordings as such constitute secondary evidence. *See* Conrad, *Magnetic Recordings, supra* note 122, at 30.

126. CAL. EVID. CODE § 1500 (West 1965). On the best evidence rule, see C. MCCORMICK, HANDBOOK ON THE LAW OF EVIDENCE § 229 (2d ed. 1972); 4 J. WIGMORE, EVIDENCE § 1177 (J. Chadbourn rev. 1970); B. WITKIN, CALIFORNIA EVIDENCE § 688 (2d ed. 1966); MODEL CODE OF EVIDENCE rule 602 (1942). *See also* Lawrence v. Premier Indem. Assur. Co., 180 Cal. 688, 697, 182 P. 431, 435 (1919).

ensure against fraud and mistake, the original should be available for inspection.[127]

A sample solution to the problem of admissibility of videotape copies is found in the Rules of Evidence for the United States District Courts and Magistrates. Rule 1003 provides:

> A duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original.

When the only concern is with getting the words or other contents before the court with accuracy and precision, then a counterpart serves equally well as the original, if the counterpart is the product of a method which insures accuracy and genuineness.[128]

It has been held in California, at least as to audio tapes, that because recordings come within the broad definition of writings,[129] the original recording is the best evidence and a mechanical transcription from the original tape does not satisfy the rule.[130] This view, however, does not seem to be uniform, even within California.[131] There

127. MODEL CODE OF EVIDENCE rule 602, Comment (1942). *See also* CAL. EVID. CODE § 1500, Comment (West 1965); C. MCCORMICK, HANDBOOK ON THE LAW OF EVIDENCE § 231 (2d ed. 1972); 4 J. WIGMORE, EVIDENCE § 1179 (J. Chadbourn rev. 1970); B. WITKIN, CALIFORNIA EVIDENCE § 688 (2d ed. 1966).

If the videotape is not being used to prove its content, the best evidence rule does not apply. *See* 4 J. WIGMORE, EVIDENCE § 1242 (J. Chadbourn rev. 1970); United States v. Alexander, 326 F.2d 736, 739 (4th Cir. 1964); Meyers v. United States, 171 F.2d 800, 812 (D.C. Cir. 1948).

128. As defined in the new federal rules, "duplicate" includes "electronic re-recordings." FED. R. EVID. 1001(4) reproduced in 41 U.S.L.W. 4021, 34 (Nov. 21, 1972). The comment to this section states: "The definition describes 'copies' produced by methods possessing an accuracy which virtually eliminates the possibility of error." It should be noted that the magnetic or electronic re-recording is treated as a "duplicate" rather than an "original," whereas an "original" of a photograph includes the negative or any print therefrom. Id. 1001(3).

129. CAL. EVID. CODE § 250 (West 1965) based on UNIFORM RULE OF EVIDENCE 1(13). See text accompanying notes 40-41 *supra.*

130. People v. King, 101 Cal. App. 2d 500, 225 P.2d 950 (1950) (it was error (but not prejudicial) to admit copies of an original tape recording where the originals were not available at trial and where they were intentionally destroyed), commented on in 64 HARV. L. REV. 1369 (1951). *Contra,* Hurt v. State, 303 P.2d 476, 485 (Okla. 1956) (admission of copy sustained when original was lost or destroyed).

131. *See, e.g.,* People v. Wojahn, 169 Cal. App. 2d 135, 146, 337 P.2d 192, 198 (1959) (not error to admit a copy of an audiotape taken when the original was available for comparison and the re-recording was clearer than the original). The California rule was further muddled in *People v. Albert,* wherein a re-recording was held admissible when an investigator testified to the circumstances of the making of the copy and that it accurately reflected the contents of the original. 182 Cal. App. 2d 729, 741-42, 6 Cal. Rptr. 473, 480 (1960). The court cited *Wojahn* for the proposition that the best evidence rule is "inapplicable to tape re-recordings . . . ." *Id.* at 742, 6 Cal. Rptr. at 480.

is no reason why copies of videotapes or any other photographically or electronically reproduced documents should be excluded by the best evidence rule where the reproduction is an exact copy of the original.[132] These copies should be treated at least as "duplicate originals," which presently are treated as originals for the purpose of judging admissibility.[133] Since carbon copies are now generally regarded as duplicate originals,[134] there is no reason why videotape copies should not be treated in the same manner.[135]

Conclusion

Traditionally, there has been a preference for live testimony at trial because it was the only means by which a jury could observe the witness as he testified and judge his demeanor. A substitute for live testimony was permitted only in rare instances. The use of video-recorded testimony represents a substantial departure from this tradition. Videotape presently provides a more convenient and less expensive alternative to live testimony. Through videotape, testimony can be presented without sacrificing the incidents of live presentation. In addition, there is increased flexibility. Juries can view scenes and experiments which would require an inordinate or prohibitive amount of time if presented live. Video depositions add to the trial lawyer's arsenal of discovery tools—demeanor becomes an ingredient of the deposition.

The experimentation to date shows that videotape can provide our courts with a reliable, flexible and inexpensive means of making our

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See also People v. Stephens, 117 Cal. App. 2d 653, 256 P.2d 1033 (1953) (re-recordings more reliable than memories of conversations); People v. Porter, 105 Cal. App. 2d 324, 233 P.2d 102 (1951) (failure to object to admission of re-recordings at trial constituted waiver of objection); Annot., 58 A.L.R.2d 1024, 1042 (1958).

132. B. WITKIN, CALIFORNIA EVIDENCE § 689 (2d ed. 1966). *See also* People v. Albert, 182 Cal. App. 2d 729, 741-42, 6 Cal. Rptr. 473, 480 (1960); People v. Wojahn, 169 Cal. App. 2d 135, 146, 337 P.2d 192, 198 (1959); Hurt v. State, 303 P.2d 476, 485 (Okla. 1956); State v. Lyskoski, 47 Wash. 2d 102, 110, 287 P.2d 114, 118 (1955).

133. C. MCCORMICK, HANDBOOK ON THE LAW OF EVIDENCE § 235, at 567 (2d ed. 1972); 4 J. WIGMORE, EVIDENCE § 1233 (J. Chadbourn rev. 1970); 64 HARV. L. REV. 1369 (1951).

134. People v. Lockhart, 200 Cal. App. 2d 862, 871, 19 Cal. Rptr. 719, 725 (1962); C. MCCORMICK, HANDBOOK ON THE LAW OF EVIDENCE § 236, at 567-69 (2d ed. 1972); Annot., 65 A.L.R.2d 342 (1959).

135. *See* B. WITKIN, CALIFORNIA EVIDENCE § 690, at 644 (2d ed. 1966); *cf.* Hopkins v. Hopkins, 157 Cal. App. 2d 313, 321, 320 P.2d 918, 923 (1958). *See also* UNIFORM RULE OF EVIDENCE 72 (photographic reproductions of business records); 28 U.S.C. § 1732(b) (1970) (photographic reproductions of business records); CAL. EVID. CODE § 1550 (West Supp. 1972) (photographic reproductions of business records excepted from the best evidence rule); *id.* § 1551 (photographic or electronic video copies excepted from the best evidence rule when original is lost or destroyed).

judicial system more efficient. However, we must continue to explore the opportunities for the use of videotape. The primary limitation on the adaptability of video techniques to the courtroom is not technical. Rather, it is the reluctance of the legal community to accept the use of videotape and experiment with it in planning and discovery and preparing for trial. As this reluctance is overcome and videotape procedures are implemented with guidance from the bench, the legal community is benefitted.

This benefit will not be complete until courts and legislators eliminate outmoded procedural and evidentiary rules which are a roadblock to the use of videotape. Hopefully, they will adopt rules which encourage the use of videotape in our judicial system.